
U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 409
Boston, Massachusetts 02109

Case No.: 86-ERA-2

In the Matter of:

Thomas G. Bassett,
Claimant

v.

Niagara Mohawk Power Company,
Employer

RECOMMENDED ORDER - DISMISSING COMPLAINT

This is a proceeding initiated in accordance with the terms of a special employee-protection provision of the Energy Reorganization Act of 1974, 42 U.S.C. ¶ 5851, as implemented by regulations issued by the Secretary of Labor, 29 C.F.R. ¶ 24 (1980).

Under consideration here are responses by Complainant and Respondent to my Order to Show Cause, entered November 15, 1985. That order directed the parties to my concern that the matter presented in this proceeding may not be a complaint cognizable under the statute.

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As pertinent here, the statute bars certain employers from, discriminating against any employee who has:

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding . . . for the administration or enforcement of any requirement imposed . . .
> (2) testified or is about to testify in any such proceeding, or:

> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended. 42 U.S.C. ¶ 5851(a).

It is not contested in this proceeding that Respondent here is a covered employer.

The statute's implementing regulations provide for an expedited administrative investigation and determination of any employee complaint of relevant discrimination. In the event, as here, the administrative determination is that the complaint lacks merit, the employee may appeal and secure an on-the-record hearing before an administrative law judge.

In this case, the employee filed a formal complaint with the appropriate administrative office, the Wage and Hour Division of the U.S. Department of Labor, in a letter dated August 23, 1985. A letter to Complainant, dated October 10, 1985, from the Assistant Area Director of the Wage and Hour Division advised him that his complaint was not substantiated. Complainant then appealed that determination, thereby initiating this on-the-record hearing process.

Complaint asserts two discriminatory incidents. First, he refers to a reorganization being implemented for Respondent's Quality Assurance Department where he has been employed. In Claimant's view, the reorganization effectively demotes him. Referring to the newly established organization chart for his

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department, Complainant states:

> ... Again, I and other more experienced, better qualified personnel are relegated to the bottoms of the charts, while many comparatively "green" employees and newcomers to the corporation are shown in responsible management and supervisory positions. (Complaint, p. 1) Complainant avers that this is Respondent's latest act in furtherance of a course of conduct directed to me in retaliation for my protected activities as a quality assurance auditor . . . . [Affidavit, 11/22/85, p. 2]

The second act of discrimination alleged is Respondent's denial to Complainant, on August 14, 1985, of a certain temporary parking permit at a "close-in" parking lot. Complainant was then temporarily handicapped and he could walk to his workplace from his normal parking lot location only with extreme difficulty. Complainant alleges the denial was "part of an ongoing conspiracy or course of prohibited conduct, in retaliation for protected activities engaged in by me as a NIMO quality assurance auditor." [Affidavit, 11/22/85, p. 4].

While it seems probable to me that, in a proper factual context, the two incidents complained of could very well constitute prohibited retaliatory conduct by an employer, the controlling issue here is whether the complaint alleges relevant activity protected by Section 5851(a) of the statute. on that issue in response to my show cause order, Complainant argues as follows:

> The definition of protected activity is as broad as the definition of prohibited conduct. Virtually every action taken by a quality assurance auditor falls within the protection of the ERA, including purely internal reporting. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Consolidated Edison Company of New York, Inc., v. Donovan*, 67 F.2d 61 (2d Cir. 1982).

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> In the instant complaint, Bassett [Complainant] alleges that he engaged in protected activity in that while conscientiously and professionally performing his duties he identified management level deficiencies in NIMO's [Respondent's] quality assurance program.

In his August 23, 1985, letter of complaint, Complainant describes his relevant activity in the following paragraph:

> I submit that the organization charts are further evidence of a years-old ongoing (since 1981) conspiracy. The conspiracy is designed to punish those experienced and qualified employees who earlier, while conscientiously and professionally performing their assigned tasks, identified management-level deficiencies in the NMPC nuclear quality assurance program, [Complaint, p. 2]

I conclude that the complaint does not allege performance by Complainant of activity protected by Section 5851(a). Complainant did take action to identify deficiencies in nuclear quality assurance programs, a program governed by relevant federal nuclear safety regulations. But that activity was performed entirely within the corporate structure of the Respondent. There was no action by Complainant having a connection with any governmental proceeding. In a comparable factual situation, in *Brown & Root, Inc., v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), an employee's filing of an intracorporate quality control report was found to be conduct not protected under Section 5851(a). The Court summarized its ruling as follows:

> We accordingly hold that employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under Section 5851. We do not purport to *define* what constitutes protected conduct under Section 5851; such a determination is unnecessary to the resolution of this case. We do not say that an employee

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> states a claim under Section 5851 if he merely alleges employer discrimination on the basis of employee contact or involvement with a competent organ of government; however, absent such contact or involvement, the employee does not make out a claim under this section. We do not attempt to say what protected conduct under Section 5851 *is*; we indicate only what it *is not*. Since the filings in this case were purely internal, we hold they were not within the scope of Section 5851. [Emphasis in original decision text]

The Court went on to recognize and discuss the contrary holding of the Ninth Circuit in *Mackowiak, supra*, but found its rationale unpersuasive. The Court also pointed out that the nature of protected activity was not in issue before the Second Circuit in *Consolidated Edison, supra*. The Court observed that there:

> . . . neither party challenged this application and there is certainly no discussion of the issue in that case. We believe that had the matter been argued, the outcome of that case might well have been different.

I conclude that the holding and rationale of *Brown & Root* should govern the disposition of this case.

Accordingly, upon review of the record presented in this proceeding in light of the arguments and factual assertions summarized above, it is ORDERED that the complaint be, and it is hereby, DISMISSED.

ROBERT M. GLENNON
Administrative Law Judge

Dated: MAR 12 1986
Boston, Massachusetts

RMG:jtd

Notice: Pursuant to 29 C.F.R. Para. 24.6(a) this recommended decision is being forwarded this date, along with the records, to the Secretary of Labor for a final order.